(8)

No. 84-902

In the Supreme Court of the United States

OCTOBER TERM, 1985

WARDAIR CANADA INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

CHARLES FRIED
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ABRAHAM D. SOFAER
Legal Adviser
Department of State
Washington, D.C. 20520

JIM J. MARQUEZ
General Counsel
Department of Transportation
Washington, D.C. 20590

17

QUESTION PRESENTED

Whether a Florida sales tax on aviation fuel, as applied to fuel purchased by foreign airlines for use exclusively in international traffic, unconstitutionally impairs the power of the federal government to regulate foreign commerce.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-902

WARDAIR CANADA INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

INTEREST OF THE UNITED STATES

The federal government has exclusive responsibility for the conduct of commercial relations with foreign governments, including the implementation of this Nation's international aviation policy. Congress has directed "[t]he Secretary of State [to] advise the Secretary of Transportation * * * concerning the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services" (49 U.S.C. App. 1462). "In formulating United States international air transportation policy," Congress has provided that the Secretary of State, in consultation with the Secretary of Transportation, "shall de-

velop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system" (49 U.S.C. App. 1502(b)).

The United States has a substantial interest in ensuring that state laws do not interfere with the accomplishment of federal objectives in the field of international aviation. The Florida tax at issue here, if sustained as applied to aviation fuel used by foreign airlines exclusively in foreign commerce, will impair federal aviation policy and complicate, if not undermine, the federal government's efforts in international negotiations. At this Court's invitation, the United States previously filed a brief urging that probable jurisdiction be noted in this case.

ARGUMENT

1. In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979), this Court held that the Commerce Clause commits to the exclusive authority of the federal government the regulation of those aspects of foreign commerce which by their very nature "necessitate a uniform national rule." In the brief that we previously filed, we explained why we believe that the imposition of levies and charges on airplane equipment and supplies, including aviation fuel, used by foreign airlines exclusively in international traffic, is an aspect of foreign commerce that shares this nature. The United States has long believed that our foreign commerce is best served by the elimination, to the greatest extent possible, of obstacles to the free flow of international aviation. To that end, the United States has consistently advocated a policy under which the instrumentalities of international air transport are granted, on the basis of reciprocity, a complete exemption from taxes levied by any jurisdiction outside the carrier's own country.

Due in part to our Nation's advocacy, the policy of reciprocal tax exemptions has become the accepted international norm in the aviation field, a pattern that reflects the longstanding custom of nations in international maritime trade. This consensus is evident in the Chicago Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.*, in Resolutions adopted pursuant to that Convention by the International Civil Aviation Organization (ICAO), and in our bilateral executive agreements. Virtually all 157 nations party to the Chicago Convention have substantially implemented the ICAO Resolutions, and, accordingly, grant aviation fuel purchased by foreign airlines for use in international traffic a complete exemption from taxes, including sales, use, and excise taxes, levied either by national governments or by their political subdivisions. See U.S. Br. 10-22.

This Court noted in *Japan Line* that "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential" (441 U.S. at 448), and held that such a tax is invalid if it "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments'" (*id.* at 451, quoting *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976)). In the brief that we previously filed (U.S. Br. 22-35), we explained in detail our reasons for concluding that Florida's sales tax on aviation fuel, as applied to fuel purchased by foreign airlines for use exclusively in foreign commerce, is inconsistent with strongly-articulated federal policy and with accepted international practice, and hence is unconstitutional under the Commerce

Clause as construed in *Japan Line*. We have little to add to the discussion set forth in that brief insofar as the application of Florida's tax to the appellants in *Lineas Aereas Costarricenses* v. *Florida Department of Revenue*, No. 84-922, and *Air Jamaica Limited* v. *Florida Department of Revenue*, No. 84-1041, is concerned. Those cases are being held pending disposition of the instant appeal.

The instant appellant, unlike the appellants in the other two cases, is domiciled in Canada. As we noted in our earlier brief (at 13), Canada appears to be the sole possible exception to the international norm of reciprocal tax exemptions described above. While United States airlines, through bilateral executive agreement,[1] are exempt from taxes imposed by the Canadian national authorities on fuel purchased in Canada, Canada's provincial governments also "impose taxes on aviation fuel and, like Florida, [they] generally do not grant an exemption for fuel purchased by foreign airlines for use in foreign commerce" (U.S. Br. 13). This case accordingly raises the question whether the appellant here, by reason of Canada's domestic taxing practices, is "situated differently from the other appellants" (*id.* at 35). We believe that it is not.

2. Ten Canadian provincial governments currently impose taxes on the sale of aviation fuel.[2] In their

[1] See Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58; Air Transport Services Agreement, Jan. 17, 1966, United States-Canada, art. XI, 17 U.S.T. 201, 205.

[2] The statistical information set forth in the succeeding paragraphs was provided to us by the Canadian Embassy, or was compiled at our request by the U.S. Department of Energy, based on data furnished to it by Canadian authorities.

structure and incidence, these taxes are similar to the challenged Florida tax. As in effect in April 1983, when Florida enacted its levy, the tax rates varied considerably from province to province, ranging from a low of $0.007 (Canadian) per liter (*e.g.*, in Newfoundland and Prince Edward Island), to a high of $0.050 (Canadian) per liter (in British Columbia). Expressed in U.S. dollars per gallon at current exchange rates,[3] the Newfoundland tax in 1983 was about 1.9 cents a gallon, and the British Columbia tax was about 13.55 cents a gallon, representing approximately 2% and 15% respectively of the total purchase price paid by a United States carrier. Generally speaking, Canadian provincial tax rates on aviation fuel were higher in the country's western, energy-producing provinces than in its Atlantic seaboard provinces. Two provinces—Quebec and Alberta—exempted foreign airlines from tax in 1983, and those exemptions continue to the present day. The other eight provinces continue to tax aviation fuel purchased by foreign airlines, although the tax rates have changed somewhat since 1983.

Before this litigation began, the State Department had not had occasion to approach Canadian authorities formally concerning the provincial fuel taxes described above. In many instances, protests by federal aviation officials to foreign governments are prompted by complaints from United States carriers. Although the Canadian provinces have levied sales taxes on aviation fuel for a number of years, United States carriers had not previously lodged formal complaints with United States officials about that

[3] See Wall St. J., Dec. 19, 1985, at 34, col. 2.

practice.[4] In view of the absence of formal complaints, as well as the questions that the Government of Canada (pointing to actions like Florida's here) could have been expected to raise concerning the ability of the United States itself to guarantee full reciprocity at the local level, the federal government did not believe itself in a position to pursue relief vigorously from the Canadian provincial taxes.

Following the commencement of this lawsuit, however, federal officials have notified the Canadian Government of the United States' concern as to whether the Canadian provincial taxes constitute a failure of reciprocity and of the United States' intention to pursue this issue. The Department of Transportation has conferred with United States carriers, through the medium of the Air Transport Association, about the implications of this case. The Department has been informed that the domestic airlines fully support a diplomatic initiative with Canada.

3. In our view, the existence of the Canadian provincial taxes described above makes no difference to the assessment of the constitutionality of Florida's tax as applied to the Canadian appellant. If Florida's tax violates the Commerce Clause, as we believe it does, it is because "the taxation of foreign-owned [instrumentalities of air commerce] is an area where a uniform federal rule is essential" (*Japan Line*,

---

[4] The reasons for this absence of complaint are not entirely clear. Several of the principal Canadian destinations for U.S. carriers (such as Montreal, Calgary, and Edmonton) lie in the two provinces (Quebec and Alberta) that exempt foreign carriers from fuel tax. Toronto, probably the chief destination, lies in Ontario, which imposes a fuel tax, but whose refinery price for jet fuel (between April 1983 and January 1984, the most recent period for which figures are available) was almost invariably lower than that prevailing elsewhere in Canada.

441 U.S. at 455). The "uniform federal rule" involved here is the United States' longstanding policy of granting foreign airlines, and of encouraging other countries to grant our airlines, exemption from all applicable taxes on the basis of reciprocity. It is the federal *policy*, not the particular taxing practice of a particular foreign state, on which the validity of Florida's tax depends.

This Court held in *Japan Line* (441 U.S at 453) that "[a state], by its unilateral act, cannot be permitted to place * * * impediments before this Nation's conduct of its foreign relations and its foreign trade." By undertaking to tax aviation fuel purchased by a foreign airline for use in foreign commerce, a state impedes the United States' international aviation policy regardless of the actual taxing practice of the foreign airline's domicile. If the foreign domicile grants reciprocity, the state's action will invite retaliatory taxation, or other retaliatory measures, against United States carriers abroad, retaliation that "of necessity would be felt by the Nation as a whole" (*ibid.* (footnote omitted)). If the foreign domicile does not grant reciprocity, the state's action would undercut the United States' position in negotiations designed to rectify that problem, since the United States would then be disabled from offering the foreign government true reciprocity in return. In either event, the state's action would frustrate the federal objectives of maintaining and extending the practice of reciprocal tax exemptions in the field of international aviation.

The Canadian provincial taxes to which we have referred may cause international difficulties. Any problems they create, however, "are problems that admit only of a federal remedy [and] do not admit of a

unilateral solution by a State" (*Japan Line*, 441 U.S. at 457). If those taxes are said to breach reciprocity, it is the federal government, not the individual states, that must make the appropriate inquiry. And if those taxes are determined to breach reciprocity, it is the federal government, not the individual states, that is alone capable of taking the diplomatic steps (including the adoption of any appropriate sanctions) necessary to effect a resolution.[5]

4. In its motion to dismiss (Mot. to Dis. 13-14, 29-30), Florida has argued that the effect of our position, in the case of appellants generally, is to discriminate in favor of foreign airlines and against domestic airlines that compete with them on the same routes. The Florida Supreme Court has sustained the constitutionality of Florida's tax as applied to

[5] Any other conclusion would produce an extremely awkward result, both from a doctrinal and a practical point of view. It would be conceptually odd if the Commerce Clause made the constitutionality of a state tax hinge on the individual taxing practice of a particular foreign country. Practically speaking, moreover, the states are very poorly situated to determine whether a foreign nation (or one of its political subdivisions) has committed a breach of reciprocity sufficient to justify the state's imposition of a tax. Particularly is this so since the internationally-favored reciprocal exemption policy covers not only aviation fuel, but a long list of aviation equipment, lubricants, and supplies (including such items as food and alcoholic beverages) incidental to transnational flights. And even if a state were capable of tracking the performance of the 156 foreign signatories to the Chicago Convention on these matters, it would clearly be in no position to decide what mode and degree of "retaliation" might be desirable or correct. Of course, should efforts of the executive branch ultimately prove unsuccessful in resolving the problem, Congress under the Commerce Clause could authorize the imposition of appropriately responsive taxation by the states.

fuel purchased by domestic airlines, and the domestic carriers' appeals were dismissed by this Court. *E.g.*, *Eastern Airlines, Inc.* v. *Florida Department of Revenue*, 455 So. 2d 311 (1984), appeal dismissed, No. 84-926 (Oct. 15, 1985).[6] In view of that decision, Florida contends, our position in effect "destroys competitive equality" between domestic and foreign carriers by requiring Florida to grant the latter a tax subsidy that their domestic competitors do not enjoy (Mot. to Dis. 13).

This assertion is incorrect. The construction of the Foreign Commerce Clause that we urge does indeed grant foreign airlines a "tax holiday" in the United States with respect to certain items—aviation fuel, equipment, and supplies—on which their domestic competitors may have to pay tax. In view of the almost universal acceptance of the reciprocal exemption policy, however, United States airlines will have a tax holiday *abroad* with respect to those same items, items on which any applicable taxes will have to be paid by foreign competitors domiciled in those nations. Because of the symmetrical nature of the reciprocal exemption policy, in other words, there is no discrimination between domestic and foreign carriers when the situation is viewed, as it must be viewed, from a worldwide rather than from a water's-edge perspective.

More generally, United States carriers do business abroad at the suffrance of their host governments, and they depend to a large degree on those govern-

[6] Although the domestic airlines involved in those appeals engaged in foreign as well as interstate commerce, they did not argue that Florida's tax as applied to them violated the Foreign Commerce Clause. See 84-921, 84-926 & 84-929 U.S. Br. 7 n.2.

ments' goodwill. Because foreign nations correctly regard Florida's tax on aviation fuel as a failure of reciprocity, and because they have evidenced by their diplomatic notes (see U.S. Br. 21-22) serious concern about Florida's action, those governments can be expected to take retaliatory measures against United States carriers if Florida's tax is sustained. Besides imposing taxes at the national or local level, foreign nations could retaliate by discriminating against United States airlines in various ways. In the past, United States carriers have encountered a variety of discriminatory measures abroad, including the levy of artificially-inflated "user fees," the imposition of obstacles to repatriation of foreign earnings, the routing of airlines to less desirable airports, the refusal to let carriers use baggage handlers of choice, the award to local airlines of preference in carrying air cargo, the imposition of restrictions on United States airlines' local advertising, and the infliction of excessively complicated customs procedures and bureaucratic red tape. See U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-108 (1977).

For most United States airlines, the competitive disadvantage they risk suffering abroad if Florida's tax is sustained dwarfs any disadvantage they suffer here by virtue of foreign airlines' enjoyment of a state tax exemption that domestic carriers do not share. As noted in our earlier brief (at 16-17), this Nation's recent bilateral aviation agreements obligate the United States to use its best efforts to secure for foreign airlines an exemption from state and local taxes on aviation fuel and supplies; these agreements were developed and negotiated with the concurrence of United States carriers. Domestic carriers have expressed no opposition to the position that we have

taken in this case. Indeed, American Airlines, a United States carrier with extensive international operations, has joined in a brief amicus curiae urging that the decision below be reversed. See Brief of Amicus Curiae Aer Lingus et al., No. 84-902.[7]

[7] Even if the construction that we urge were thought to produce some kind of net discrimination in favor of foreign airlines, that fact would not be dispositive of the Commerce Clause outcome. The effect of this Court's decision in *Japan Line* was to grant foreign-owned shipping containers an exemption from state property taxes that domestically-owned shipping containers did not enjoy. But the Court explicitly rejected California's "policy argument[]" that "by exempting [the Japanese] containers from tax, the State in effect will be forced to discriminate against domestic, in favor of foreign, commerce" (441 U.S. at 456, 457). Even if Florida's argument concerning alleged "discrimination" were correct, therefore, it would have no greater weight here in assessing the constitutionality of the challenged tax than California's virtually identical argument had in *Japan Line*. Of course, if domestic carriers believed themselves disadvantaged by the constitutional outcome which, in the absence of congressional legislation, we submit to be proper under the Foreign Commerce Clause, they could seek appropriate relief from Congress. When such "policy arguments" are directed to this Court, however, they "are directed to the wrong forum" (*Japan Line*, 441 U.S. at 456, 457).

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

ABRAHAM D. SOFAER
Legal Adviser
Department of State

JIM J. MARQUEZ
General Counsel
Department of Transportation

DECEMBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20017